

NTSB Order No. EA-4514

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of December, 1996

Respondent .

Docket SE-14391

Respondent has appealed from the oral initial decision issued by Administrative Law Judge Patrick G. Geraghty on May 1, 1996.¹ The law judge affirmed the Administrator's order suspending respondent's airline transport pilot certificate for 30 days, upon finding that respondent had violated 14 C.F.R. 91.119(c).² We deny the appeal.

²Section 91.119(c) provides as pertinent that, in sparsely

The Administrator's complaint charges that, on October 3, 1995, respondent was pilot-in-command (PIC) of a Cessna aircraft that flew too low in the area of Arches National Park, Utah.³ Respondent, in his answer, admitted that he was the owner of the aircraft in question (and the Administrator offered un rebutted evidence on this point). On appeal, respondent argues that the law judge erred in concluding that respondent was the PIC of the aircraft at the time and in concluding that the aircraft flew prohibitively close to persons and vehicles.⁴

Park Ranger Gary Salamacha witnessed the flight, and the law judge thoroughly discussed his testimony, notably the estimates of the aircraft's altitude and the witness' inability to read the

populated areas, and except when taking off or landing, a person may not operate an aircraft closer than 500 feet to any person, vessel, vehicle or structure.

³At the hearing, the parties alternatively spoke of respondent's acting as PIC and his actually operating the aircraft. The latter need not be proven, as the PIC is generally responsible for the safe operation of the aircraft whether the flying pilot or not.

⁴Respondent also argues that he was improperly denied a jury trial in this matter and that the law judge erred in refusing to admit a number of photos respondent offered. As to the first claim, respondent acknowledges that precedent is to the contrary. See Hill v. National Trans. Safety Bd., 886 F.2d 1275, 1282 (10th Cir. 1989). Regarding the second claim, we agree with the law judge that the photos would have added no useful evidence to the record. Respondent testified that he had been taking photos, and the law judge "accept[ed] the fact that photographs were in fact taken." Tr. at 148. However, respondent also admitted that there were no photos taken of the area in which the incident occurred (Tr. at 114-115), and that he could not tell distances to objects on the ground. Tr. at 111. The law judge concluded that the photos were inadequate to establish distance from objects.

aircraft's number. Tr. at 139-143.⁵ The law judge also made a specific credibility finding in Mr. Salamacha's favor. Respondent offers no basis to overturn the law judge's decision, either on evidentiary or credibility grounds; his assertions of Mr. Salamacha's bias are not supported. Respondent also misapprehends precedent and FAA policies when he suggests that the testimony of one witness is not adequate either to satisfy the FAA's burden of proof or the FAA's investigatory guidelines. (As the Administrator also notes, this issue was not raised before the law judge.)

To establish that it was respondent who was the PIC, the Administrator offered testimony from Dale Ogden, who had spoken to the two male occupants of the aircraft on the afternoon of the incident and the next day. Mr. Ogden testified that they discussed the event, and he relayed the Ranger's request that the pilot of the aircraft contact him. Respondent dominated the conversation, according to Mr. Ogden, and was the one who left to call the ranger. Respondent testified that, at the time, the other individual in the aircraft, who allegedly was also a pilot, was flying the Cessna.

The issue before the law judge ultimately was whether the Administrator had met his burden of proof that it was respondent

⁵Respondent suggests that the Ranger's evidence was inadequate to establish that there were people or vehicles within less than 500 feet of the aircraft. But, at a minimum, there was one person, the Ranger, and his vehicle. That is all that is required. Further, the Ranger's report indicates that there were at least 12 vehicles in the area. Exhibit R-1.

who was the PIC. The law judge discussed our decision in Administrator v. Dye, 2 NTSB 1581 (1975), finding that it supported a finding for the Administrator on this point. He found, and respondent does not argue the contrary, that respondent held a pilot certificate, was the registered owner, and was in the aircraft at the time. Those facts, combined with Mr. Ogden's testimony, including respondent's call to Mr. Salamacha in response to his request that "the pilot" contact him, presented sufficient circumstantial evidence to switch the burden of going forward to respondent. See Administrator v. Baehr, NTSB Order No. EA-4075 (1994), at 6.⁶ In the absence of evidence of some sort from respondent's passenger, the issue became one of credibility. Again, there is no basis to overturn that finding. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).⁷

⁶The law judge characterized it as an affirmative defense. The law judge did not shift the burden of proof, as respondent contends, despite his use of that phrase. The burden of proof clearly remained with the Administrator.

⁷And, there was only respondent's word that his passenger, whose name was never offered, even had a pilot certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 30-day suspension of respondent's pilot certificate shall begin 30 days from the service of this order.⁸

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁸For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).